In the words of Mr. Xavier, the Industrial Court did not order the regrading or promoting of Mr. Soon but found as a fact that he was appointed a Grade I Hospital Assistant, but paid a Grade II salary.

With respect we would agree with Azmi J. that section 30(7) does not apply. In so holding, there would be no necessity to decide whether there is any lacuna in that subsection. His reasoning that this is a "non-time frame" award, and therefore that there is no question of retrospectivity in the order, would remove the need for such an exercise.

An analogous situation arose before the Industrial Arbitration Tribunal in *Chartered Bank, Kuching* v. *Kuching Bank Employees' Union*[1] (I.A.T. Case No. 4 of 1966). Para. 11 of the 2nd Schedule to the Essential (Trades Dispute in the Essential Services) Regulations, 1965 *inter alia* provides that an award may be retrospective to such a date not being earlier than six months from the date on which the dispute was first referred to the tribunal. The worker, in this case was dismissed on April 6, 1961, and the dispute was first referred to the tribunal on March 25, 1966. It was argued that any order for reinstatement would mean that the worker would be reinstated more than 6 months from the date on which the dispute was first referred to the tribunal and this would be *ultra vires* the regulations.

The tribunal held that trade disputes could develop out of acts and incidents which took place before the regulations were made and upon the tribunal dealing with the dispute, there does not appear to be any reason why the power of the tribunal to order reinstatement should be abrogated. The award (to reinstate) itself could not be said to be retrospective although the legal consequences which ordinarily flowed from the award and which was not of the tribunal's making, would give a retrospective benefit to the worker.

Similarly what the Industrial Court found in the present case after weighing all the evidence, is that Mr. Soon, from the date he commenced serving the appellant company, had been appointed a Grade I Hospital Assistant, as the Union contended he had been, and not Grade II, as the appellant company contended. The consequence of this finding, the entitlement to a certain sum of money which is the difference between what he had received from the appellants and what the court found he should have been paid, an entitlement which has already accrued, even if it does give a retrospective benefit, is not an award with retrospective effect.

Mr. Nathan also says that in making the award, the Industrial Court had acted beyond its jurisdiction and under the old section 29(3) of the Industrial Relations Act, 1967 (re-numbered section 32(3) as from 1.9.76 and repealed by Act A484 w.e.f. 30.5.80), applicable at the time of the award, a superior court can interfere by way of an order of *certiorari*. Mr. Xavier on the other hand maintains that the Industrial Court's finding was one of fact and therefore *certiorari* does not lie.

Both have referred us to the decision of the Privy Council in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*[2] There, their Lordships had, following the House of Lords decision in *Anisminic* v. *Foreign Compensation Commission,*[3] held that where the words in a statute oust the power of the High Court to review the decision of an inferior tribunal by *certiorari*, they must be construed strictly, and will not have the effect of ousting that power unless the inferior tribunal has acted without jurisdiction, for example if it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. If the inferior tribunal had merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of natural justice then the ouster will be effective.

"Trade dispute" is defined in section 2 of the Act and there can be no doubt that a trade dispute had arisen between the parties, which the Minister had properly referred to the Industrial Court under section 26(2) of the Act. We think that the court had properly applied its mind to the matter in dispute prior to making its award. It cannot therefore be said to be acting outside its jurisdiction.

We are inclined to view its award as one which arose from a finding of fact, but even if it could be said that this award, or that part of it in excess of six months from the date of reference is contrary to section 30(7) of the Act, (which we think it is not) and therefore constitutes an error of law on the face of the record, the effect of the decision in *South East Asia Fire Bricks Sdn. Bhd.* is that section 29(3)(a) effectively ousts the jurisdiction of the High Court to quash the award.

Therefore we would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Ng Yook Woon, Andrew T.C. Saw & Zaharudin; D.P. Xavier & Co.*

V. SINNATHAMBOO v. MINISTER FOR LABOUR AND MANPOWER

[O.C.J. (Mohamed Azmi J.) August 5, 1978]

[Kuala Lumpur — Originating Motion No. 104 of 1976]

Administrative Law — Certiorari — Order of Director-General for Industrial Relations on behalf of Minister — Dismissal of workman — Application not made within one month of dismissal — Whether provisions for time limit mandatory — Industrial Relations Act, 1967, ss. 17A, 20(1) & 30(3).

Industrial Law — Dismissal of workman — Application not made to Director-General within one month of dismissal — Application dismissed — Industrial Relations Act, 1967, ss. 17A, 20(1) & 30(3).

The applicant had been dismissed on November 19, 1975. He did not make representations to the Director-General of Industrial Relations until January 13, 1976. The Director-General on behalf of the Minister made an order that his representation could not be entertained, as it was not made within one month of his dismissal. The applicant applied for an order of *certiorari* to quash the order of the Director-General acting on behalf of the Minister.

Held: (1) the one-month time limit prescribed under the Act is a mandatory provision and failure to comply was fatal to the claim of the workman who was not a member of a union;

(2) the remedy of *certiorari* is discretionary and this was not a proper case where the remedy sought should be given.

Cases referred to:-

(1) *Pearse* v. *Morrice* (1834) 4 L.J.K.B.D. 21, 23; 111 E.R. 32.

(2) *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments* (Torquay) Ltd. [1970] 2 All E.R. 871, 883.

(3) *Reg.* v. *National Insurance Commissioner* [1972] A.C. 944, 1005.

(4) *Lakshmi Lal* v. *Bhagwat Singh Mehta* A.I.R. 1952 Raj. 22.

(5) *Dedman* v. *British Building* [1974] 1 W.L.R. 171.

The following cases were also referred to in argument: *Mak Sik Kwong* v. *Minister of Home Affairs* [1975] 2 M.L.J. 175; *Kesatuan Pekerja-Pekerja Kenderaan Jaya* v. *Industrial Court & Ors.* [1969] 2 M.L.J. 27; *Queen* v. *Newborough* (1869) L.R. 4 Q.B. 585.

ORIGINATING MOTION.

V.P. Xavier for the applicant.

Lim Beng Choon (Senior Federal Counsel) for the 1st and 2nd respondents.

C.V. Das for the 3rd and 4th respondents.

Cur. Adv. Vult.

Mohamed Azmi J.: This was an application by Vincent Sinnathamboo for an order of *certiorari* to remove into this court for the purpose of it being quashed the order dated May 5, 1976 by the Director-General for Industrial Relations acting on behalf of the Minister for Labour and Manpower. When I dismissed the application with costs on March 16, 1978, I indicated to counsel that I would give my reasons later. I now proceed to do so. In this case, three grounds were given in the applicant's statement, viz.: —

(a) That the Director-General for Industrial Relations acting on behalf of the Minister for Labour and Manpower was wrong in law in holding that the applicant did not appeal to the Director-General of Industrial Relations within a month of his dismissal as required under the provisions of the Industrial Relations Act, 1967.

(b) That the Director-General for Industrial Relations acting on behalf of the Minister for Labour and Manpower acted in excess of jurisdiction when he held that Universal Cars was the applicant's employer.

(c) That the Director-General for Industrial Relations acting on behalf of the Minister of Labour and Manpower acted against the principle of natural justice in not affording the applicant an opportunity to adduce evidence in support of the applicant's contention that Wearne Brothers and not Universal Cars was the applicant's employer.

However, at the hearing of this application, counsel for the applicant abandoned grounds (b) and (c), and he merely confined the application on ground (a). The issue for determination was, "is non-compliance with the one month rule in subsection (1) of section 17 of the Industrial Relations Act, 1967 (now section 20(1) of the revised Act) fatal to the applicant's right?"

Section 17 of the Industrial Relations Act, 1967, which is *in pari materia* with section 20 of the revised Act, provides:

"(1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at within a period of not more than thirty days from the date of receipt of the representations. Where the Director General is satisfied that there is no likelihood of the representations being settled within the said period of thirty days or where the representations remain unsettled at the end of the said period of thirty days the Director General shall notify the Minister accordingly.

(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the court for an award.

(4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

(5) This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of section 59 where proceedings have been commenced before a court in respect of an offence under section 59(1); where, while proceedings are pending under this section, proceedings arising out of the same dismissal are commenced before a court in respect of an offence under section 59(1), the proceedings under this section shall not be proceeded with further."

Briefly, V. Sinnathamboo, the applicant, was employed by Wearne Brothers Services Malaysia Sdn. Bhd. as a sales manager in their subsidiary company Universal Cars Sdn. Bhd. This was apparent from Exhibit "TJS 3" and "TJS 4" annexed to affidavit enclosure (9) and also Exhibit "VT 1" annexed to affidavit enclosure (1). In my view, these exhibits showed there could be no doubt in the applicant's mind or for that matter in anybody's mind that his employer was in fact Wearne Brothers Services Malaysia Sdn. Bhd., the third respondent. It was not in dispute that the applicant's services were terminated by Wearne Brothers with effect from November 19, 1975. The applicant made his representation in writing to the Director-General of Industrial Relations only on January 13, 1976, i.e. approximately 1 month 24 days after he was dismissed. The order of the Minister dated May 5, 1976 (see Exhibit "VT 6" attached to affidavit enclosure 1) stated that the applicant's representation cannot be entertained under section 17A of the Industrial Relations Act, 1967 because his representation was not made within one month of his dismissal.

Mr. Xavier, counsel for the applicant, argued that the time-limit imposed under section 20(1) of the revised Act was merely directory and not mandatory. For this proposition, he relied on the case of *Pearse* v. *Morrice*(1) and *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.*(2) Shortly, the argument was that, if Parliament provided time-limit and intended it to be mandatory, then it would provide follow-up provision for penalty in case of non-

compliance, and it could not simply be inferred that Parliament intended the provision to be mandatory. In the absence of follow-up penalty provision, it was argued that the time-limit provision was merely directory in the absence of specific provision to the contrary. In support of this argument, Mr. Xavier referred to section 9(3), section 11, section 13(4) and (5), section 30(3) and section 43(1) and (2) of the Act as clear examples.

It was further argued in interpreting section 20(1) the purposive approach as propounded by Lord Diplock in *Reg.* v. *National Insurance Commissioner*[3] should be adopted when dealing with social legislation.

Mr. Lim Beng Choon, who appeared for the Minister for Labour and Manpower and the Director-General of the Industrial Relations (respondent Nos. 1 and 2), submitted that the fact that the applicant had now abandoned his grounds as contained in paragraph 10 of his affidavit (enclosure 1) was by itself sufficient ground for dismissing this application for misleading the court and for suppression of facts. He referred to the Constitution of India by *Chitaley & Rao* (2nd Edition), Volume 4, page 3, where it was stated that, "In an application for a writ of *certiorari* all relevant facts must be stated and counsel must not pick and choose what facts are to be stated". Thus, in *Lakshmi Lal* v. *Bhagwat Singh Mehta,*[4] it was held that in a writ of petition, suppression of facts which were necessary for the superior court to come to a decision on points involved was itself fatal to the application. Mr. Lim submitted that the words "within one month of the dismissal" under section 20(1) were material and that the Director-General of Industrial Relations was only given the jurisdiction if appeal was lodged in time. He referred to the scope of section 20 and he argued that there must be set time for appeal and Parliament had decided any appeal after one month of date of dismissal becomes a stale appeal and therefore could not be entertained. Further, the interest of both employer and employee should be safeguarded and that the one month rule was in the interest of both. It was his submission that section 20(1) did not confer a right to applicant. It merely enabled a workman to refer disputes to the Director-General and thence to the Minister, and it was entirely at the discretion of the Minister whether to refer the matter to the Industrial Court. The fact that the Department of Industrial Relations had taken certain action under section 20(2) on receipt of the applicant's representation, although submitted out of time, could not cure the non-compliance of section 20(1), since the Director-General had no jurisdiction. It was irrelevant that certain action had been taken under section 20(2) by the Department of Industrial Relations.

Mr. Das, counsel for the third and fourth respondents, also submitted that the effect of non-compliance with time-limit under section 20(1) was fatal. The word "may" in line 3 of section 20(1) referred to making representation to the Director-General and, as such, the words within the two commas, i.e. "within one month of the dismissal", were imperative. Parliament had thus made it clear by simple words that a workman must make representation within one month and such representation might be filed at the office of the Director-General nearest to the place of employment of the workman who was dismissed. In response to Mr. Xavier's argument that there was no follow-up penalty clause, Mr. Das submitted that, if Parliament intended the time-limit as merely directory it would have provided an escape clause giving power to the Director-General to enlarge time in proper cases as was the case in English legislation. (See *Dedman* v. *British Building Ltd.*[5]). Another example, according to him, was section 30(3) of our Act which provides:

> "The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under section 20(3)."

In the absence of an escape clause, it was therefore contended that section 20(1) could not be directory.

Having perused the affidavit in support of this application (enclosure 1), and also the two counter-affidavits (enclosures 8 and 9), and having considered submission by counsel in this case, I was of the view that there was no principle of construction of statute to say that unless there were follow-up provisions for consequences of non-compliance, the provision was directory and could not be mandatory. Similarly, there was no principle of law to say that unless there was an escape clause, the provision as to time-limit should be construed as mandatory. In my judgment, section 20(1) should be construed in the context of the Industrial Relations Act and, in particular, to Part VI of the Act. It was important to note that the Industrial Relations Act dealt with two types of disputes, namely, collective dispute known as trade dispute, and dismissal of individual workman. The Act was enacted primarily for collective dispute, and it was only possible for dismissal of a single workman to become a collective dispute when he was a member of a trade union. The only exception was Part VI of the Act (in which section 20 appeared) where non-unionised workman might get remedy for reinstatement at the discretion of the Minister on reference to Industrial Court. I therefore agreed with Mr. Das that the various sections relating to time-limit referred to by Mr. Xavier were in connection with collective dispute and they did not refer to Part VI of the Act. Further, section 30(3) applied only to Industrial Court and it did not refer to the Minister exercising his power under section 20.

In the event, I was of the view that the one month time-limit prescribed under section 20(1) of the revised Act was a mandatory provision; and failure to comply was fatal to a workman who was not a member of a trade union. In my view, that was the most natural interpretation of section 20(1) having regard to the clear words used by Parliament. I further agreed with Mr. Das that Part VI of the Act was an extraordinary relief given to a non-unionised workman. If it was the intention of Parliament to make the time-limit as a mere directory provision, then it would say so clearly. In the instant case, there was no justification for the court to import words into section 20. The social nature of this legislation was not affected by giving section 20(1) its

natural and ordinary meaning. In my view, it was in the interest of employer and employee relationship and also in the interest of industrial peace that a non-unionised workman who was aggrieved by his dismissal should exercise his right within one month from the date of his dismissal. As stated by Lord Denning in *Dedman* v. *British Building Ltd.*[5]:

"Under the provisions of the Industrial Relations Act 1971 a worker who seeks compensation for unfair dismissal is bound to comply with a very strict time limit. He must present his complaint within four weeks after his employment has terminated. There is an 'escape clause' which I will consider in a moment, but, unless the worker can bring himself within it, he is barred.

According to the decisions of the Industrial Court, the time limit is so strict that it goes to the jurisdiction of the tribunal to hear the complaint. By that I mean that, if the complaint is presented to the tribunal just one day late, the tribunal has no jurisdiction to consider it. Even if the employer is ready to waive it and says to the tribunal: 'I do not want to take advantage of this man. I will not take any point that he is a day late'; nevertheless the tribunal cannot hear the case. It has no power to extend the time: see *Westward Circuits Ltd.* v. *Read* [1973] I.C.R. 301 and *Rogers* v. *Bodfari (Transport) Ltd.* [1973] I.C.R. 325. The complaint must actually reach the tribunal itself within the four weeks. It is not sufficient for the man to put it into the post-box. He must see that it is 'presented' and delivered into the hands of the clerks of the tribunal themselves within the four weeks. If it arrives a minute after midnight on the last day, the clerks must throw it out. The tribunal is not competent to hear it: see *Anglo Continental School of English (Bournemouth) Ltd.* v. *Gardiner* [1973] I.C.R. 261. In counting the time, too, the man is not even given the full four weeks. According to the decision of the Industrial Court, the first day includes the very day on which his employment terminates so that he must deliver it to the tribunal within 27 days thereafter. Else he is out: see *Hammond* v. *Haigh Castle Co. Ltd.* [1973] I.C.R. 148; *Haigh* v. *A. Lewis & Co. (Westminster) Ltd.* (unreported), April 11, 1973."

Although section 23(5) of the English Industrial Relations Act 1971 was not *in pari materia* with our section 20(1), I was of the view that a strict interpretation was desirable in our case. To conclude otherwise would result in serious consequences, in that the Industrial Court would be flooded with stale appeals, and employers would be left in a state of uncertainty as to when a dismissed workman would exercise his right under section 20(1). Such state of affairs would certainly not help in promoting industrial peace in this country. Further, the remedy of *certiorari* was entirely discretionary and, in my view, this was not a proper case where the remedy sought should be given.

Order accordingly.

JUMATSAH BIN DAUD & ANOR. v. VOON KIN KUET & ANOR.

[O.C.J. (Chong Siew Fai J.) June 30, 1980]
[Kuching — Civil Suit No. K. 496 of 1977]

Practice and Procedure — Limitation — Filing of writ within limitation period — Writ of summons signed and sealed after expiry date — Power of court to amend date — R.S.C. 1957, O. 2 r. 8.

Limitation — Filing of writ within period — Court official signed and sealed it after expiry date — Whether action statute-barred — Limitation Ordinance (Sarawak Cap. 49), ss. 3 & 6(1).

In this case the plaintiffs had filed a writ and paid the fee therefor within the period of limitation but from the date appearing on the writ it seemed that the court official had signed and sealed the writ after the date of expiry. The following facts or points of law were not in dispute:—

(a) The road accident occurred on November 6, 1974.

(b) The writ of Summons in this action was filed with the High Court Registry at Kuching, on November 2, 1977 and the filing fee therefor was paid on the same date.

(c) The Writ of Summons bore the date "the 14th day of November 1977" which appeared to indicate that the writ was sealed on November 14, 1977.

(d) Under the Limitation Ordinance, the period of limitation is 3 years from the date the accident occurred (Item 92 of the Schedule thereto), and the period of limitation expired on November 6, 1977.

Held: (1) having regard to the provisions in Order 2 rule 8 the writ should be dated on the day the writ was filed and the filing fee was paid, and with the same date of the filing and the payment;

(2) in this case amendment to the writ should be allowed so that the date "14th day of November 1977" appearing on the writ of summons would read "2nd day of November, 1977";

(3) the defence that the action in this case was statute-barred failed.

Cases referred to:-

(1) *Boota Singh* v. *Isman bin Ali* [1957] M.L.J. 127.
(2) *Clark* v. *Bradlaugh* [1881-5] All E.R. Rep. 1002 C.A.
(3) *Pritam Kaur* v. *S. Russell & Sons Ltd.* [1973] 1 All E.R. 617.
(4) *Kirk* v. *Dolby* 151 E.R. 567.
(5) *Ponnamma & Anor.* v. *Padmanabhan & Ors.* A.I.R. 1969 Ker. 163.
(6) *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy & Ors.* (1876) I.L.R. 1 Cal. 226.

CIVIL SUIT.

Anthony Liew (standing in for *M.S. Sandhu*) for the plaintiffs.

Lee Chuan Eng for the defendants.

Cur. Adv. Vult.

Chong Siew Fai J.: On February 5, 1980, Datuk Mohd. Yusoff J., on an application by the defendants in this action, made an order that the issue raised in the defence of the defendants as to whether the plaintiffs' action herein is barred by virtue of the Limitation Ordinance be set down for hearing, and be disposed of as a preliminary point of law before the trial.

There are two plaintiffs in this action. The 1st plaintiff, Jumatsah bin Daud, is an infant and he brings this action by his father and next friend, Daud bin Ibrahim. The 2nd plaintiff is also Daud bin Ibrahim who sues both in his personal capacity and as the administrator of the estate of his son Hazari bin Daud, deceased. The claims against the two defendants are for damages arising out of a road traffic accident in which the 1st plaintiff was injured and the deceased died. By their defence, the defendants deny liability and contend that the plaintiffs' claims are statute-barred under the Limitation Ordinance.

For the purpose of determining this preliminary issue, the following facts or points of law are relevant and are not in dispute:

(1) The road accident occurred on November 6, 1974.

(2) The writ of summons in this action was filed with the High Court Registry at Kuching, on Novem-